

**Wyndham West at Garden City and Local 32B-32J,  
Service Employees International Union. Case  
AO-291**

April 17, 1992

ADVISORY OPINION

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT  
AND RAUDABAUGH

On March 11, 1992, a petition for an advisory opinion pursuant to Sections 102.98 and 102.99 of the Board's Rules and Regulations was received from William Ackerman, the court-appointed receiver for the Employer, Wyndham West at Garden City, through his attorney, Sidney L. Meyer, seeking to determine whether the Board would assert jurisdiction over the Employer's operations.

The petition, in pertinent part, alleges as follows:

1. This matter was previously before the Board in Case 29-RC-7529 but was dismissed by the Regional Director for Region 29 on March 29, 1990, prior to any hearing, on grounds that the Employer did not meet the Board's jurisdictional standards. A similar matter is currently pending before the New York State Labor Relations Board (the SLRB) in Case SE-575739.<sup>1</sup>

2. The Employer is a housing complex located in Long Island, New York, which was originally intended as a condominium development that proved unsuccessful.<sup>2</sup> Foreclosure action was thereafter instituted by two lending institutions, and the Petitioner was appointed as receiver by the court to operate the Employer's property while the foreclosure action is pending. The Petitioner has been authorized by the court to rent the unsold apartments. The Petitioner alleges that the change in the nature of the development from a condominium to a rental apartment complex also resulted in a change in the Employer's financial basis rendering obsolete the evidence relied on by the Regional Director in his dismissal of the petition in Case 29-RC-7529.

3. From April to November 1990, the Employer's cost of operating and maintaining the property in question exceeded \$3 million.<sup>3</sup> During the calendar year

1991, the Employer's income totaled \$6,440,083.91, and its expenses totaled \$5,813,239.83.<sup>4</sup> The Employer also purchased at least \$50,000 worth of goods and services from suppliers located outside the State of New York, or from suppliers who purchased their goods and services outside New York State for resale within the State.

The Union has submitted a statement of position opposing the petition. It contends that in Case 29-RC-7529, the Employer obtained a dismissal of the representation petition by claiming it did not meet the Board's jurisdictional standards, and only after the Union instituted proceedings with the SLRB did the Employer contend that it was subject to the Board's jurisdiction. The Union asserts that if the Board were to assert jurisdiction, it would be rewarding the Employer for its inconsistent, misleading, and delaying tactics, and would deprive employees of the ability to file charges due to the passage of time. The Union, however, does not contest the revenue data submitted by the Petitioner in support of the petition, and the SLRB has made no findings with respect thereto.

Having duly considered the matter,<sup>5</sup> the Board is of the opinion that it would assert jurisdiction over the Employer. The Board has established a \$500,000 discretionary standard for asserting jurisdiction over residential premises such as apartments and condominiums.<sup>6</sup> As the petition alleges that the Employer's income from the operation of its property during 1991 was \$6,440,083.91, the Employer clearly satisfies the Board's discretionary jurisdiction.<sup>7</sup> Further, as the Employer allegedly purchased over \$50,000 worth of goods and services from suppliers located outside the State of New York, or from suppliers who purchased such goods and services outside New York State for resale

<sup>4</sup> The Petitioner submitted a "cash receipts" and "cash disbursements" statement for calendar year 1991 with the petition.

<sup>5</sup> The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

<sup>6</sup> See, e.g., *Carroll Associates*, 300 NLRB 698 (1990) (apartment buildings); *Coastal Property Services*, 299 NLRB 106 (1990) (condominiums/cooperatives).

<sup>7</sup> Although the Employer may not have met the Board's jurisdictional requirements in 1990 resulting in the dismissal of the petition in Case 29-RC-7529, it is clear from the amounts alleged to have been received in 1991 that it now satisfies the Board's jurisdictional standards. We note in this regard that in applying its standard, the Board uniformly relies "on the experience of an employer during the most recent calendar or fiscal year . . ." *Hebrew Free Burial Assn.*, 299 NLRB 678 (1990).

<sup>1</sup> We have been administratively advised that the SLRB has taken no action on the petition pending the Board's ruling on the Petitioner's request for an advisory opinion.

<sup>2</sup> The number of apartments sold was less than 10 percent.

<sup>3</sup> This figure includes taxes paid for previous periods. The Employer's cost and operating expenses for this 8-month period, minus the taxes paid, exceeds \$1 million.

within the State, the Employer also clearly satisfies the Board's statutory standard for asserting jurisdiction.<sup>8</sup>

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<sup>8</sup>We find *Elmsford Transportation Corp.*, 213 NLRB 257 (1974), which the Union cites as support for its position that dismissal of the petition is warranted, factually distinguishable from the instant case. In *Elmsford*, the Board dismissed an employer's petition for an advisory opinion at a time when an election had already been conducted by a state board and the Board's policy is to accord to a state-directed election the same effect it accords to its own elections. The Board found dismissal to be warranted on grounds that the employer had engaged in "forum shopping" by asserting initially that it was not subject to the Board's jurisdiction and by thereafter not contesting the state board's jurisdiction over it until just prior to the state-board election. Here, unlike in *Elmsford*, no SLRB election has been conducted, and the Petitioner, who was not a party to the proceedings in Case 29-CA-7529, has, since August 1990 (soon after being appointed receiver), asserted that the SLRB does not have jurisdiction over the Employer and that the Employer, instead, is sub-

Accordingly, the parties are advised that, based on the foregoing allegations and assumptions, the Board would assert jurisdiction over the Employer.<sup>9</sup>

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ject to the Board's jurisdiction, an assertion that the Union does not contest. For these reasons, we find that *Elmsford* is not controlling here, and that the Petitioner has not engaged in "forum-shopping," as suggested by the Union.

<sup>9</sup>The Board's advisory opinion proceedings under Sec. 102.98(a) of the Board's Rules and Regulations are designed primarily to determine whether an Employer's operations meet the Board's "commerce" standards for asserting jurisdiction. Accordingly, the instant advisory opinion is not intended to express any view as to whether the Board would, under Sec. 9(c) of the Act, certify the Union as the representative of the unit petitioned for in the SLRB proceeding, or as to the merits or timeliness of any charge that may be filed with the Board. See generally Sec. 101.40(e) of the Board's Rules and Regulations.